

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6188

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JESSE B. STEPHENS, on behalf of
himself and all other persons
similarly situated,

Plaintiff-Appellant,

-against-

UNITED STATES POSTAL SERVICE;
E. THEODORE KLASSEN, in his
capacity as Postmaster General of
the United States; UNITED STATES
CIVIL SERVICE COMMISSION; and
ROBERT E. HAMPTON, in his capacity
as Chairman of the United States
Civil Service Commission,

Defendants-Appellees,

UNITED STATES OF AMERICA; and
ELMER B. STAATS, in his capacity
as Comptroller General of the
United States,

Defendants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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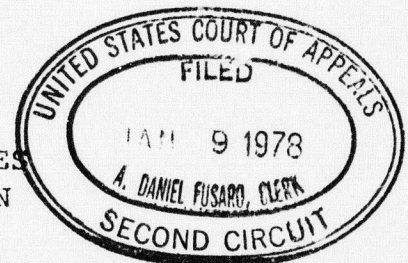


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PRELIMINARY STATEMENT

Jesse B. Stephens, the plaintiff-appellant, appeals
from an order of the United States District Court for the
Southern District of New York (Thomas P. Griesa, J.)
entered on September 9, 1977. The district court did not
render a decision.

ISSUE PRESENTED FOR REVIEW

Whether the appellant should be relieved of the effects of a judgment of the district court where its appeal showed it to have been based on a mistake of law and its continuation would be unjust.

STATEMENT OF THE CASE

Stephens is a former employee of the appellee United States Postal Service (Postal Service) who seeks to have the Postal Service pay over monies it owes him to the appellee United States Civil Service Commission (Commission) and to have the Commission establish a retirement annuity for his benefit.

On November 19, 1976, this court (Docket No. 76-6087) rendered a decision affirming in part and reversing in part a March 16, 1976 judgment of the United States District Court for the Southern District of New York in favor of the Postal Service and remanded the case for the entry of a judgment in favor of Stephens in the sum of \$3,074. In light of this court's decision, on March 11, 1976 Stephens moved for an order, pursuant to Federal Rules of Civil Procedure Rule 60(b), relieving him of the March 16, 1976 judgment, and Rule 56, granting him summary judgment directing the Postal Service to pay over to the Commission the \$3,074 and directing the Commission to establish a

retirement annuity for him, retroactive to August 12, 1971, the date his employment terminated. It is from the denial of this motion that Stephens appeals to this court.

STATEMENT OF FACTS

Stephens worked for the Postal Service for 23 years, and during the course of his employment he earned certain benefits which became payable upon termination of his employment. The major benefit was a refund from the Commission of a lump-sum retirement credit of \$6,838.83, or in lieu, payment by it of a monthly retirement annuity. A-10-11.

On August 6, 1971, the Postal Service notified the Commission that since it had charged Stephens with the theft of certain insured mail, he was indebted to it for the losses it incurred when it paid claims based on their non-delivery, and that the Commission should therefore, withhold all benefits due him. A-11,15. The Commission subsequently, at the direction of the Postal Service, paid over to it Stephens's entire lump-sum retirement credit, which it applied against the claimed indebtedness. A-12,19.

On November 7, 1971, mistakenly believing that he would not be entitled to receive a retirement annuity, Stephens personally applied to the Commission for a refund of his lump-sum retirement credit. A-12,16. Subsequently, through

an attorney, he attempted, by letter dated November 3, 1972 to the Commission, to withdraw his application for a refund of his retirement credit and file an application for an annuity, but this was rejected by the Commission by letter dated November 22, 1972. A-17-19.

Stephens then commenced this action against the Commission and the Postal Service for the payment of his benefits; the Postal Service counterclaimed for the amount of its losses.

Since Stephens had never been afforded a hearing by either the Postal Service or the Commission on the validity of the Postal Service's claimed indebtedness, a trial *de novo* was granted by the district court (Griesa, J.) and held on January 6, 1976. The trial resulted in a decision that Stephens was entitled to the sum of \$7,533¹ on his claim against the Postal Service and that the Postal Service was entitled to the sum of \$7,620 on its counterclaim against Stephens; therefore the net sum owing between the parties was \$87 from Stephens to the Postal Service. On March 16, 1976, a judgment was entered in favor of the Postal Service against Stephens for \$87. A-4.

At the trial, the issue arose as to whether Stephens was entitled to a refund of the lump-sum retirement credit or an

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The \$7,533 included the retirement credit and \$240 in salary and \$454.17 in unused annual leave credit from the Postal Service. A-11.

annuity. In opposition to Stephens's claim that he was entitled to the annuity, the attorney for the defendants took the position that the refund had been paid when the Commission paid the credit in its possession to the Postal Service in satisfaction of its claimed indebtedness, and that under 5 U.S.C. §8342(a), the receipt of payment of the retirement credit voided all annuity rights. The district court held that the Postal Service was indebted to Stephens for the retirement credit rather than the annuity. A-20-28.

There then followed this court's November 19, 1976
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decision, A-6, and the district court's denial of Stephens's motion to vacate the March 16, 1976 judgment and direct the Postal Service to pay over the monies it now owed him to the Commission and to have the Commission establish an annuity for him, retroactive to August 12, 1971, the date his employment terminated. A-35.

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Stephens did not raise on appeal the question of his entitlement to the annuity because the Commission was not a party to the March 16, 1976 judgment under appeal. A-29.

An annuity, at this point in time, is worth substantially more to Stephens than \$3,074 of his lump-sum retirement credit. He was born on August 28, 1910; the life expectancy of an individual of his age, sex and race is approximately 75 years.³ Based upon a contribution of \$3,074, an annuity would be worth in excess of approximately \$15,000.

3

The U.S. National Center for Health Statistics, 1969 Table, gives as Stephens's life expectancy 74.5 when he was 59 years of age (1969); the 1973 Table gives 73.1 when he was 65 years of age (in 1975). The U.S. National Statistic Bureau of the Census, Statistical Abstract of the United States: 1972 (93rd ed.) and 1975 (96th ed.).

ARGUMENT

POINT I

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APPEAL SHOWED IT TO HAVE
BEEN BASED UPON A MISTAKE
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WOULD BE UNJUST.

An overview of the civil service retirement system as it applied to Stephens is a necessary preface to the argument. As an employee of the Postal Service, which became the successor to the Post Office Department in 4 1971, Stephens came under the provisions of the civil 5 service retirement system, and, as required by law, there was automatically deducted a percentage of his basic pay, which was then deposited with the Treasurer of the United States to the credit of the Civil Service Retirement and 6 Disability Fund. The fund is administered by the Civil Service Commission. 5 U.S.C. §8334(a). Neither the Postal Service nor its successor has ever been involved with the administration of the retirement system.

4

U.S.C. Title 39.

5

5 U.S.C. §§8331-8348.

6

5 U.S.C. §8331, subd. 5, defines "and" as the Civil Service Retirement and Disability Fund. See also, 5 U.S.C. §8348.

Under the statutory scheme of the retirement system, where an employee, such as Stephens, has his employment terminated (called "separated from service" under the statute), he is faced with 3 possible choices of how he wants to collect his benefits: (1) if he has more than 5 years of service, he is entitled to an annuity beginning at age 62, 5 U.S.C. §8338(a), or (2) if he is removed after becoming 60 years of age and completing 20 years of employment, he is entitled to an annuity, 5 U.S.C. §8336⁷(b), or (3) regardless of how many years of service he has, he is entitled to be paid the lump-sum retirement credit⁸ if he files an application at least 31 days before the earliest commencing date of any annuity for which he is eligible, 5 U.S.C. §8342(a).

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Plaintiff's employment was terminated for cause effective August 12, 1971, following his suspension on March 31, 1969. On August 12, 1971, plaintiff was over 60 years of age.

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Section 8331, subd. 8, basically defines "lump-sum" credit as retirement deductions made from the basic pay plus certain interest.

Section 8342(a) also contains a caveat that the receipt of payment of the retirement credit by the employee voids all annuity rights. There is no provision that payment of the retirement credit to a government agency carries with it the same penalty. Receipt by the employee is the exclusive⁹ circumstance by which the annuity can be voided.

The Commission was but a stakeholder of the retirement credit or the annuity. As the earlier appeal to this court has revealed, the Commission acted prematurely, and illegally, when it paid the entire retirement credit to the Postal Service. To the extent the payment exceeded Stephens's debt, it was wrong ab initio. It did this despite knowing full well of Stephens's repeated vigorous denials of responsibility for the losses the Postal Service claimed it had incurred and without the security of a court's judgment as to the existence of any indebtedness to the Postal Service by him. It was outside the province of the Commission to decide whether or not Stephens was indebted to the Postal Service. Boerner v. U.S., 30 F. Supp. 635, 636 (S.D.N.Y. 1939), affd. 117 F.2d 387 (2 Cir. 1939), cert. den. 313 U.S. 587 (1941).

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The proscription against receiving an annuity for the conviction of certain offenses is not applicable here. 5 U.S.C. §8312. It was this proscription that caused Stephens to file his application for a refund of the lump-sum retirement credit.

The Commission's improper payment cannot be allowed to preclude the effectiveness of Stephens's request to withdraw his application for the retirement credit and replace it with an application for an annuity.

If the Commission had not acted extra-judicially, once the correct amount of Stephens's debt had been established by a court of law, Stephens could have received his annuity, the initial payments being made directly to the Postal Service until they equaled the amount of the debt, and then directly to Stephens for the balance of his life. It was more administratively convenient for both the Commission and the Postal Service to utilize the lump-sum retirement credit to satisfy the debt, rather than the annuity, which it could have used had it accepted his request to withdraw his application for the credit and replace it with one for an annuity. It was also simpler for the Commission to accept the Postal Service's unilateral decision that Stephens was indebted to it, pay the retirement credit, and then await a potential legal action by Stephens. There has never been a claim by the Commission that were it not for Stephens's application for the retirement credit it would have initially paid the annuity to the Postal Service. The payment of the retirement credit to the Postal Service became inexorable.

The district court's acceptance of the defendants' argument at the trial that in fact there had been a payment of the retirement credit (years before the trial took place) when the Commission paid it to the Postal Service was legally incorrect in light of this court's decision. Had this court reversed in toto the March 16, 1976 judgment, the Postal Service would have been compelled to return the entire retirement credit and the establishment of an annuity by the Commission would perhaps be easier to conceptualize. The fact that the Postal Service has only to return part of the retirement credit does not make Stephens's motion less justified.

Rule 60(b) of the Federal Rules of Civil Procedure authorizes a court, on numerous grounds, to relieve a party from a judgment. There are three grounds within the subdivisions of the rule applicable to the March 16, 1976 judgment: First, it was based upon a mistake of law, 60(b)(1); second, it is no longer equitable for it to have prospective application, 60(b)(5); and third, relief from it is justified, 60(b)(6).

Although motions under Rule 60(b) are addressed to the discretion of the district court, Altman v. Connally, 456 F.2d 1114 (2 Cir. 1972), overriding the exercise of discretion is the requirement that the rule be liberally construed to

insure that substantial justice is served. Klapprott v. U.S., 335 U.S. 601, 614-15, judgment mod. 336 U.S. 942 (1949); Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538,542 (2 Cir. 1963).

Under Rule 60(b)(1), "mistakes" of a court are sufficient cause to relieve a party from a judgment. This is true whether the mistake is discovered through the decision of a higher court in the same case or in an unrelated case. Tarkington v. United States Lines Company, 222 F.2d 358,360 (2 Cir. 1955); Schildhaus v. Moe, 335 F.2d 529,530-31 (2 Cir. 1964); Oliver v. Home Indemnity Company, 470 F.2d 329,330 (5 Cir. 1972); D.C. Federation of Civic Associates v. Volpe, 520 F.2d 451,453 (D.C. Cir. 1975). The question has been raised, however, if relief can be granted if the motion is made outside the time allowed for the appeal of the judgment. One commentator, and those cases which have considered it, have held that the motion must be made within the time to appeal. 7 Moore's Federal Practice, ¶60.22[3], at 267-8 (2d ed. 1975); see e.g., Lapiczak v. Zaist, 54 F.R.D. 546,548 (D. Vt. 1972). However, the rule itself allows the motion to be made within a "reasonable time" and not more than one year after the judgment was entered. 11 Wright and Miller, Federal Practice and Procedure, §2858, at 178.

When the fact that Stephens's motion was made both within a reasonable time and within one year of the entry of the judgment (as required by the Rule) is coupled with the impossibility of his having made the motion until this court had rendered its decision, the motion should be considered timely. Cf. U.S. v. Cirami, 563 F.2d 26,32 (2 Cir. 1977); but see Lapiczak v. Zaist, supra, at 548.

Under Rule 60(b)(5), a court is authorized to relieve a party of a judgment if it is no longer equitable that the judgment should have prospective application. Although relief under this subdivision has generally been limited to injunctions, it should be equally applicable to money judgments, particularly if it has not been paid. Bros Inc. v. W. E. Grace Mfg. Co., 320 F.2d 594,610 (5 Cir. 1963); 11 Wright and Miller, supra, §2863, at 205; see 7 Moore's, supra, ¶60.26[4], at 337; but cf. Ryan v. United States Lines Company, 303 F.2d 430,431 (2 Cir. 1962) (dictum that 60(b)(5) does not cover judgment for money damages, but covers only judgments with prospective effect). In Stephens's particular situation, however, the judgment does have prospective application because its continuation has the effect of denying him an annuity payable for the balance of his life.

Finally, Rule 60(b)(6) vests power in a court to relieve a party of a judgment for any other justifiable

reason, "whenever such action is appropriate to accomplish justice", Klapprott v. U.S., supra, at 614-15, provided extraordinary circumstances or extreme hardship are presented. U.S. v. Cirami, supra, at 30. The extraordinary circumstance presented in this case is the effect this court's decision has had on the decision of the district court with respect to the annuity; the extreme hardship is the deprivation of the valuable annuity.

CONCLUSION

For the foregoing reasons, the order of the district court entered on September 9, 1977 should be reversed.

January 3, 1978

Respectfully submitted,

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